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CHAPTER 23

Security for Costs in the SCC Rules

Johan Sidklev[*]

§23.01 INTRODUCTION

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has developed into one of the world's leading forums for dispute resolution.[1] The 2017 caseload was the third highest since the SCC was founded in 1917. Hence, the SCC continues to hold a strong position as a venue for dispute resolution among both domestic and international parties. With the SCC continuously looking to innovate and modernize its practices, it recently adopted a new set of rules that entered into force on January 1, 2017.[2] Among a number of revisions, the SCC introduced a provision that regulates the arbitral tribunal's power to order a claimant or counterclaimant to provide security for costs.

In international commercial arbitration, party autonomy will often determine the types of interim measures an arbitral tribunal is empowered to order. There is a broad variety of measures that can be classified as an interim measure, and commentators have categorized them in five main types: (i) measures for the preservation of evidence, (ii) measures to regulate and stabilize relations between the parties during the proceedings, (iii) measures to ensure the enforcement of the award, (iv) orders for interim payments, and (v) measures to provide security for costs.[3]

* I want to extend warm thanks to Associate Oskar Magnusson for valuable research work and assistance in the preparation of this contribution. I also want to thank Counsel Eva Storskrubb for her review and helpful comments.

1. According to statistics, the SCC administered 200 cases, of which, 96 were international and 104 were Swedish in 2017, Statistics 2017, http://sccinstitute.com/statistics/ (accessed June 4, 2018).
2. The 2017 SCC Rules, http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf (accessed June 4, 2018).
3. Lew J, Mistelis L & Kroll S, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), pp. 595.

Security for costs can be defined as a measure for the preservation of sufficient assets to satisfy a party's claim. However, as described by one commentator: "[security for costs] orders require one party (or both parties) to post security to cover the likely amounts that would be awarded to the counter-party in the event that it prevails in the arbitration and is entitled to recover its legal costs."[4] Thus, security for costs is distinguished from security for the claim in dispute.

Article 38 of the 2017 SCC Rules expressly authorizes the arbitral tribunal to grant a request for a security for costs order if the criteria set out in the provision are met. Thus, the new security for costs provision in Article 38 complements the general interim measures provision in Article 37 of the SCC Rules. This contribution will focus on analyzing the new security for costs provision in Article 38 of the 2017 SCC Rules.

Furthermore, the subject of third-party funding in relation to security for costs application will be touched upon. The number of cases that are funded by means of third-party funding has increased in recent years.[5] Since third-party funding provides a possibility for impecunious parties wanting to pursue a claim in arbitration, the question arises if tribunals should award security for costs when the claimant is funded by a third party.[6]

§23.02 THE NEW SCC RULES ON SECURITY FOR COSTS

[A] Comparative Background

Traditionally, security for costs has been more common as a type of interim relief in England and Wales and in other common law jurisdictions. Outside the common law jurisdictions, arbitral tribunals have traditionally been reluctant to order security for costs. However, in recent years, international tribunals have been more willing to consider granting such requests.[7] In institutional rules, there are different approaches taken as regards security for costs. Generally, two approaches can be identified. First, there are rules that contain express provisions regarding security for costs. Second, there are rules that does not contain an express provision, but instead the interim measure provision is considered to constitute a valid basis for security for costs.

As mentioned above, security for costs is a common feature in England and Wales, and the Arbitration Act expressly provides for the power to order security for costs.[8] Therefore it is not surprising that the rules of the London Court of International Arbitration (LCIA) empower tribunals to order security for costs, *see* Article 25(2).

4. Born G, *International Commercial Arbitration*, Second Edition (Kluwer Law International, 2014), p. 2495.
5. ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (The ICCA Reports No. 4, 2018), p. 1, https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html (accessed July 12, 2018).
6. *Ibid.*, p. 167.
7. Born G, *International Commercial Arbitration*, Second Edition (Kluwer Law International, 2014), pp. 2495–2496.
8. Born G, *International Commercial Arbitration*, Second Edition (Kluwer Law International, 2014), p. 2495.

Similarly, in other institutional rules that are influenced by the common law tradition, the same type of provision can be found. This is the case, for example, in Article 27(j) of the rules of the Singapore International Arbitration Centre (SIAC) and in Article 24 of the rules of the Hong Kong International Arbitration Centre (HIAK).

In addition, even under institutional rules where no express provision regarding security for costs exists, tribunals may be empowered to grant security for costs orders under their power to grant interim measures depending on the wording of the relevant rules.[9] Hence, such power would still be subject to the relevant provision allowing tribunals to grant security for costs orders. Often provisions on interim measures in institutional rules are broad and leave considerable discretion to the arbitral tribunal. For example, Article 28 (1) of the International Chamber of Commerce (ICC) rules of provides that: "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. […]." In practice, arbitral tribunals grant a broad range of interim measures under the ICC rules, and security for costs is among the types of measures that have been held to be within powers of an arbitral tribunal in ICC proceedings.[10]

[B] History of Security for Costs under the SCC Rules

Under the 1999 SCC Rules, an order for interim measures could only be granted for the purpose of securing the claim. Therefore, there was historically no basis in the SCC Rules for a tribunal to order security for costs. In the 2007 revision of the SCC Rules, the provision on interim measures was broadened, and the aim was to bring the rules in line with the corresponding UNCITRAL Model Law provision as well as international practice. Another aim was to improve clarity and flexibility.[11] Thus, the 2007 rules allowed for wider discretion of the arbitral tribunal with respect to ordering different types of interim measures. However, even if the wording was broader, it did not clarify whether security for costs was encompassed. In addition, it was considered that prior practice was relevant going forward, which indicated that security for costs was not supposed to be among the possible remedies.[12]

The wording adopted in the 2007 rules on interim measures was maintained throughout the 2012 revision. Thus, the question of security for costs as a potential remedy was not elucidated. Notably, during this period, security for costs was not an interim measure typically used in SCC practice. Therefore, an issue that arose before the subcommittee working on the revision of the 2017 SCC Arbitration Rules was whether to provide clarity with respect to security for costs and whether it was necessary for security for costs as a possible procedural remedy to be expressly set out

9. Lew J, Mistelis L & Kroll S, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), p. 601.
10. Fry J, Greenberg S & Mazza F, *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration* (ICC, 2012), p. 289.
11. Magnusson A & Shaughnessy P, "The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce" (2006) *Stockholm International Arbitration Review* 3, p. 59.
12. *Ibid*.

in the 2017 rules. In the end, the subcommittee decided that an arbitral tribunal should have the power under the SCC Rules to order security for costs and that it was necessary to provide an explicit power to do so in Article 38 of the rules. Thus, the unclear situation that had arisen due to the prior drafting history was dealt with. When considering this issue, the majority of the subcommittee members were of the opinion that security for costs was indeed something which ought to be included already in the existing and very broad Article 32, by which a tribunal can grant any interim measure it deems appropriate. However, the subcommittee then recognized that the issue was debated precisely because it was not clear whether security for costs is included or not and therefore decided in favor of a wholly new provision to this effect in the 2017 Rules.

[1] The New Provision

Article 38 of the 2017 SCC Rules states that:

> (1) The Arbitral Tribunal may, in exceptional circumstances and at the request of a party, order any Claimant or Counter-claimant to provide security for costs in any manner the Arbitral Tribunal deems appropriate.
> (2) In determining whether to order security for costs, the Arbitral Tribunal shall have regard to:
> (i) the prospects of success of the claims, counterclaims and defences;
> (ii) the Claimant's or Counterclaimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award;
> (iii) whether it is appropriate in all the circumstances of the case to order one party to provide security; and
> (iv) any other relevant circumstances.
> (3) If a party fails to comply with an order to provide security, the Arbitral Tribunal may stay or dismiss the party's claims in whole or in part.
> (4) Any decision to stay or to dismiss a party's claims shall take the form of an order or an award.

The arbitral tribunal is empowered in paragraph 1 to order security for costs, but its discretion is notably limited in that it can only do so in exceptional circumstances. How that express limitation will be interpreted in practice by tribunals will be crucial to the applicability of the provision. No information has yet emerged in the public domain on such practice. However, in an ICC arbitration, it was held that exceptional circumstances may refer to insolvency of a party or a fundamental change in the party's situation since the arbitration agreement was signed with reference to doctrine going even further stating "that only deliberate insolvency or a significant and unpredictable deterioration of a party´s financial situation can justify security for costs."[13]

The fact that a request may only be granted in exceptional circumstances supports the view expressed in the doctrine that it would be unfortunate if the granting

13. Jarvin S & Nguyen C, *Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents* (Kluwer Law International, 2017), p. 253.

of security for costs were to become a common occurrence in international arbitration.[14] In line with this view is the notion that security for costs orders may interfere with a party's access to justice insofar the party lacks financial means to comply with the security for costs order and thus is denied the opportunity to be heard.[15] Therefore, there is a need to balance the right of a party to pursue its claim against the right of an opposing party to recover its costs.

The relevant criteria for assessing whether to grant a request for security for costs are established in paragraph two of Article 38. The criteria largely reflect the best practices outlined in the Practice Guideline on Applications for Security for Costs issued by the Chartered Institute of Arbitrators (CIArb).[16] According to the first criterion, the arbitral tribunal shall have regard to the prospects of success of the claims, counterclaims, and defenses. In this respect, the arbitral tribunal naturally has to be careful not to prejudge or predetermine the merits of the case and to ensure that the security for costs application only is made prima facie as to not compromise their impartiality.[17]

According to the second criterion, the tribunal shall have regard to the claimant's or counterclaimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award. A party's lack of funds may constitute a serious risk that the party may not satisfy an adverse costs award. In such event, a security for costs order may be granted. However, the lack or inaccessibility of assets is merely one aspect to be considered, not alone a sufficient one. As noted above, the access to justice perspective may also be relevant in such an assessment. However, if it were to transpire that the party is in the financial state as to make funds available to satisfy an adverse costs award, the tribunal should arguably reject the application for security for costs. In addition, if the party's financial state was known to the other party when the parties entered into the contractual relationships, a tribunal may be hesitant to order security for costs as the inability to pay may be an inherent and accepted business risk.[18] When considering a security for costs application, the fact that the claimant or counterclaimant has its residence in a country different from the place of the arbitration is not a sufficient reason to order security for costs.[19] However, the location of the assets of a party may be assessed under the relevant criteria since the location will play a part in assessing how difficult it would be to enforce a costs award.[20]

14. Gaillard E & Savage J (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), p. 687.
15. Born G, *International Commercial Arbitration*, Second Edition (Kluwer Law International, 2014), p. 2496.
16. CIARB Arbitration Guidelines, Applications for Security for Costs, 2016, p. 1, http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines (accessed July 18, 2018).
17. *Ibid.*, pp. 5–6.
18. *Ibid.*, p. 7; Kirtley W & Wietrzykowski K, "Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?" (2013) 30 *Journal of International Arbitration* 1, p. 20.
19. Lew J, Mistelis L & Kroll S, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) p. 602.
20. CIARB Arbitration Guidelines, Applications for Security for Costs, 2016, p. 9, http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines (accessed July 18, 2018).

Notwithstanding that based on the above-elaborated criteria there are grounds that constitute a basis for ordering security for costs, the tribunal shall according to the third criterion always take into account whether it is appropriate in light of all the circumstances of the case to grant the request. For example, if a claimant's inability to comply with a cost award has been caused by the conduct of the party requesting security for costs, such as delay in payment, the tribunal may dismiss the request as inappropriate.[21] Lastly, as the final criterion, the tribunal may consider any other relevant circumstances. Such relevant circumstances could be, for example, an evasive refusal of discovery of financial information. If an impecunious claimant has been asked to provide financial documents and so refuses, even when the tribunal has ordered discovery, the tribunal is entitled to draw an adverse inference from the evasion of the claimant.[22] Another example that has been put forward is where the claimant is merely nominal and, there is, in fact, a third party standing to benefit from a potential positive outcome of the dispute.[23] However, what constitutes relevant circumstances, other than what is mentioned in the foregoing items, must be assessed on a case-by-case basis. What was subject to considerable consideration, once the criteria for granting security for costs was agreed upon, was what kind of sanction, if any, that should be tied to a party's potential failure to adhere to an order for putting up security for costs. It was agreed that giving the tribunal a permissive power to terminate such part of the proceedings that are related to the security for costs (such as if the security relates to a counterclaim), if an order for security for costs is not fulfilled, was an appropriate sanction. After a comparative outlook, it was considered that a sanction of more flexible nature would better cater for the adaption of the tribunal's security for cost ruling to the specific circumstances of each case. Hence, the subcommittee opted for a sanction allowing the tribunal to "stay or dismiss the party's claims in whole or in part" in case its security for cost order was not respected.

[C] Security for Costs and Third-Party Funding

Third-party funding has been described as follows "[i]n its simplest form, third-party funding involves an entity, with no prior interest in the legal dispute, providing financing to one of the parties (usually the claimant)."[24] Furthermore, the recent Queen Mary-ICCA report considered all types of dispute funding that fit the following definition:

> The term "third-party funding" refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

21. CIARB Arbitration Guidelines, Applications for Security for Costs, 2016, p. 10, http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines (accessed July 18, 2018).
22. Gu W, "Security for Costs in International Commercial Arbitration" (2005) 22 *Journal of International Arbitration* 3, p. 197.
23. *Ibid*.
24. The Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, p. 18, https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html (accessed August 20, 2018).

a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.

Thus, it can be said that third-party funding is a financing method in which a funder enters into agreement with a party to a dispute to, e.g., fund the party's legal fees or to pay an award rendered against that party.[25] An argument that is often made in support of third-party funding is that it promotes access to justice. For impecunious claimants, third-party funding might be the only viable option to pursue a claim. It has also been said to facilitate leveling the playing field between parties in an arbitration. The underlying rationale here is that disputes should be resolved based on the merits of the claims and defenses.[26] Historically, third-party funding has been obtained by claimants in financial distress as a tool to obtain access to justice. More recently, entities which are not in financial distress are looking to third-party funding as a way to pursue other business priorities instead of allocating resources to finance an arbitration.[27] Thus, third-party funding is not only sought by impecunious parties. However, for the purposes of security for costs applications, nonresource financing is of more relevance.

A party's ability to comply with an adverse costs award is often deemed a central criterion to consider when deciding on a security for costs application, for example, as expressly set out in Article 38 of the SCC Rules. Thus, a party's ability to comply with an adverse costs order will normally be considered notwithstanding that tribunals may apply different tests to security for costs applications.[28] There are divergent views on whether a third-party funding agreement should be taken into account when considering a security for costs application. However, the predominant view is that third-party funding agreements are considered as a relevant circumstance in relation to security for costs applications as the financial situation of the party requested to provide security for costs is a key aspect to consider when deciding on the application.[29] However, as noted also in the recent report of Queen Mary and ICCA, third-party funding does not per se suggest that the funded party is impecunious or unable to

25. Bench Nieuwveld L & Shannon Sahani V, *Third-Party Funding in International Arbitration*, Second Edition (Kluwer Law International, 2017) p. 1; Sidklev J & Persson C, "Chapter 15 'Sweden'" (Tom Barnes, 2017) *The Third Party Litigation Funding Law Review*, p. 145.
26. Von Goeler J, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International, 2016) p. 87.
27. The Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, p. 20, https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html (accessed August 20, 2018); Von Goeler J, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International, 2016) p. 83.
28. The Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, p. 170, https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html (accessed August 20, 2018).
29. *Ibid.*, p. 180.

comply with an adverse costs award.[30] Thus, it has been argued in the doctrine that the existence of third-party funding should not lead to a rebuttable presumption for impecuniosity.[31] This position seems correct considering that, as stated above, not only financially distressed parties to a dispute seek to obtain funding. Thus, if the funded party can show that an adverse costs order will be covered, a security for costs order may not be granted only based on the fact that there exists a funding agreement. In other words, it might be more appropriate to apply a wider test comprising of different criteria to consider when deciding on a security for costs application sought against a funded party.

Requests for security for costs orders have been upheld only on two known occasions in investment treaty arbitration. In the first of these cases, *RSM v. St. Lucia*, the tribunal found that there was a serious risk that the costs award would not be complied with. In this regard, the tribunal noted that the claimant had a history of not complying with costs awards in similar arbitrations.[32] With respect to the claimant being funded by a third party, the tribunal noted that this fact supported the tribunal's concerns that the claimant would not comply with a costs award rendered against it.[33] Put together, these facts constituted sufficient reasons for the tribunal to order the claimant to provide security for costs.

In the second case that is recent, *Garcia Armas et al. v. Venezuela*, the tribunal ordered the claimants to provide security for costs in the amount of USD 1.5 million.[34] In its decision, the tribunal noted that the applicable arbitration rules did not contain any guidance as to the relevant criteria for assessing a security for costs application. The tribunal took guidance from Article 26(3) of the 2010 UNCITRAL Arbitration Rules and determined the relevant criteria to be (i) if there was a reasonable possibility that Venezuela would prevail, (ii) if it was likely that Venezuela would suffer harm not adequately reparable by an award of damages, (iii) whether Venezuela's potential harm substantially outweighed the harm that was likely to be incurred by the claimants, and (iv) whether the condition of urgency was met.[35] In the case the claimants were ordered to disclose a third-party funding agreement. The tribunal reasoned that the third-party funding arrangement did not constitute proof that the claimants would not comply with an adverse costs award. Nonetheless, the tribunal found the funding agreement relevant for deciding on the security for costs request. The agreement in question did explicitly provide that the funder was not required to

30. *Ibid.*, p. 171.
31. Von Goeler J, *Third-Party Funding in International Arbitration and its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International, 2016) p. 341.
32. *RSM Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, paras. 77–82.
33. *Ibid.*, paras. 83–84.
34. *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, procedural order No. 9, para. 261.
35. Procedural order No. 9 is only available in Spanish, for an English commentary *see* Bohmer L, *Arbitrators Rule That Investors Backed by a Prominent Litigation Funder Must Post $1.5 Million Security in Order to Prosecute Investment Treaty Arbitration*, IA Reporter, July 11, 2018, https://www.iareporter.com/articles/arbitrators-rule-that-investors-backed-by-a-prominent-litigation-funder-must-post-1-5-million-security-in-order-to-prosecute-investment-treaty-arbitration/ (accessed August 26, 2018).

pay for any adverse costs. Therefore, the tribunal reasoned that it was uncertain whether the respondent would have any success in recovering any adverse costs if the respondent was to prevail in the arbitration.[36]

The existence of third-party funding is likely to remain one relevant factor for tribunals to consider when assessing security for costs applications; however, the real question should rather be what kind of arrangement that exists between the funder and the party to the arbitration. And, in any event, since the rationale for using third-party funding and their respective arrangements differs substantially from case to case, the mere existence of a third-party funder in a case cannot be a sole denominator for granting a request for security for costs.

[D] Conclusion

When an arbitral tribunal in an arbitration under the SCC Rules is confronted with an application for security for costs, it can now look to the applicable rules for the relevant criteria for deciding on the request. As stated above, the criteria match international best practice. Assuming that security for costs applications will be made from time to time, especially taken into account the increase in the market for parties to obtain third-party funding, Article 38 is a welcome and necessary addition to the SCC Rules. It will be interesting to closely follow whether any practice develops. In this respect, it would be useful if the SCC could at a suitable point in time issue an analysis of these cases (naturally in redacted form and respecting confidentiality), similar to what it has done for emergency arbitration cases.

It appears evident that the existence of a third-party funding arrangement may have an impact on a security for costs application. Considering the different potential motives behind a party choosing to obtain third-party funding, and the different funding arrangements applied, it is not appropriate that such funding agreement is taken as sufficient evidence to grant a security for costs request. However, it cannot be ignored that as a part of a wider test, the existence of third-party funding is an element that tribunals will continue to consider in the overall assessment of the financial situation of the party requested to provide security for costs.

36. Bohmer L, *ibid*.